

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Regulatory Committee
Date:	16 March 2016
Title:	Application for a Definitive Map Modification Order to record a Byway Open to all Traffic between Saunders Lane and Lockerley Road, in the Parish of Awbridge
Reference:	7353
Report From:	Director of Culture, Communities and Business Services

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1 Executive Summary

- 1.1 This is an application, made under Section 53 of the Wildlife and Countryside Act 1981, to record a Byway Open to all Traffic (BOAT) between Saunders Lane and Lockerley Road, in the village of Awbridge. If the application is successful, the route would be made available for use for all classes of public use (including motorised vehicles). The claim is supported by historic documentary and user evidence.
- 1.2 It is considered that the evidence submitted in support of this application is sufficient for it to be inferred that, on the balance of probabilities, the route has been dedicated as a public carriageway and that an order should be made to record the route on the Definitive Map. However, it is also considered that the provisions of the Natural Environment and Rural Communities Act 2006 have extinguished motorised vehicular rights that subsist on the route, and it is therefore recommended that the route should be recorded as a restricted byway.

2 Legal framework for the decision

WILDLIFE AND COUNTRYSIDE ACT 1981 - Section 53: Duty to keep definitive map and statement under continuous review

(2) As regards every definitive map and statement, the surveying authority shall:

b) keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence.... of any of [the events specified in sub-section (3)] by order make such modifications to the map and statement as appear to them to be requisite in consequence of that event.

(3) The events referred to in sub-section (2) are as follows: -

b) the expiration... of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

- c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
- i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way [to which this Part applies]
 - ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description
 - iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

PRESUMED DEDICATION AT COMMON LAW

Use of a way by the public without secrecy, force or permission of the landowner may give rise to an inference that the landowner intended to dedicate that way as a highway appropriate to that use, unless there is sufficient evidence to the contrary. Unlike dedication under S.31 Highways Act 1980, there is no automatic presumption of dedication after 20 years of public use, and the burden of proving that the inference arises lies on the claimant. There is no minimum period of use, and the amount of user which is sufficient to imply the intention to dedicate will vary according to the particular circumstances of the case. Any inference rests on the assumption that the landowner knew of and acquiesced in public use.

NATURAL ENVIRONMENT AND RURAL COMMUNITIES ACT 2006 – Section 67: Ending of certain existing unrecorded public rights of way

- (1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement—
 - (a) was not shown in a definitive map and statement, or
 - (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.
- (2) Subsection (1) does not apply to an existing public right of way if—
 - (a) it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles,
 - (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense),
 - (c) it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles,
 - (d) it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles, or
 - (e) it was created by virtue of use by such vehicles during a period ending before 1st December 1930.
- (3) Subsection (1) does not apply to an existing public right of way over a way if—
 - (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 (c. 69) for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic,
 - (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or
 - (c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles—
 - (i) was reasonably necessary to enable that person to obtain access to the land, or
 - (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

3 Claimant

- 3.1 The application was made in 2006 by **Awbridge Parish Council**.

4 Landowner

- 4.1 The ownership of the land over which the claimed route runs was only registered with Land Registry in 2012. The land has apparently been passed down through several generations, and on each occasion the ownership has been split between the beneficiaries. As a result, there are now reportedly six people with an interest in the land, but it has not been possible to ascertain the identity of all parties. In the absence of title deeds a statement was made in support of a caution against the first registration of the freehold estate. The cautioners are named as **Mrs Ruth Cooper of The Lodge, Coombes Plantation, Saunders Lane, Awbridge** and **Ms Fiona Mary Gradidge of 64 Mercury Close, Southampton**.

5 Description of the Route (please refer to the map attached to this report)

- 5.1 The claimed route is situated in an area of Awbridge known as 'Kents Oak', and is shown between A-B on the Committee Plan. It commences at a junction with Saunders Lane, a metalled 'U' road ('C17') which runs south-eastward to provide an access onto Lockerley Road some 60 metres to the east of the claimed route. The claimed route runs along an unsurfaced track in a south-westerly direction for approximately 60 metres to a junction with Lockerley Road ('C25'), opposite Awbridge Footpath 745, which runs over a private access road, and the village primary school. The route is enclosed on each side by a line of trees and hedgerows.

6 Background to the claim

- 6.1 The claimed route connects with Lockerley Road, which used to form part of the Romsey to Lockerley Turnpike Road. Early maps and plans indicate that the claimed route formed the southern-most part of Saunders Lane, but maps dating from the early 19th century also chart the existence of another route which bypassed the claimed route to join the Lockerley Road further to the east (it is this route which is now in public use and recorded on the List of Streets). The introduction of this route appears to mark the beginning of a decline in the significance of the claimed route.
- 6.2 The question of public rights over the claimed route was raised in the early 1980s, when a planning application to develop the area prompted enquiries to the County Council from local residents. There then ensued a protracted period of correspondence between the County Council and various members of the local community (in particular members of Awbridge Parish Council), during which time the ownership of the land and the rights that might subsist upon the route were discussed at length. Correspondence dating from this period indicates that the County Council considered the route to be a highway maintainable at public expense. In 1983 several user evidence forms were submitted to the County Council, but no formal application to record the route as public was ever made.

- 6.3 The matter was revisited by Awbridge Parish Council in 2005. In a covering letter to the County Council, Parish Councillor Anne Jones explained that the Parish Council had originally been assisted by a solicitor, whose sudden death had meant that the matter had been allowed to lapse without a formal claim being made. A formal claim was subsequently submitted to the County Council in May 2006.

7 Issues to be decided

- 7.1 The issue to be decided by this committee is whether there is evidence to show, on the balance of probabilities, that public rights subsist, or are reasonably alleged to subsist, on route A-B.
- 7.2 Under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, case law has decided that the burden of proof associated with Map Modification Orders is 'on the balance of probabilities', so it is not necessary for evidence to be conclusive or 'beyond reasonable doubt' before a change to the Definitive Map can be made. The primary issue to be decided by this Committee is whether there is clear evidence to show that public rights subsist or are reasonably alleged to subsist.
- 7.3 If Members are satisfied that this is the case, they are also asked to consider whether any of the exemptions contained in Sections 67(2) and (3) of the Natural Environment and Rural Communities (NERC) Act 2006 apply to those rights. Although not claimed in this case, evidence discovered as part of this investigation may point to the route having once been a full vehicular highway, and if exemptions under NERC can be shown to apply, the County Council would be under duty to recognise those rights by making an order to record the route as a BOAT. In the event that no exemptions apply, the route may still be recorded as a right of way, and if vehicular rights can be shown to have been dedicated at some point in the past, the appropriate status for the route to be recorded at would be a restricted byway (enabling legal use by pedestrians, cyclists, horse riders and non-motorised vehicles).
- 7.4 Any changes to the Definitive Map must reflect public rights that already exist. It follows that changes to the Definitive Map must not be made simply because such a change would be desirable, or instrumental in achieving another objective. Therefore, before an Order changing the Definitive Map is made, Members must be satisfied that public rights have come into being at some time in the past. This might be the distant past (proved by historic or documentary evidence) or in the recent past (proved by witness or documentary evidence).
- 7.5 Historic and documentary evidence has been examined to see whether the past history and use of the route point to it having public rights as a result of dedication in the distant past. Any such rights are not lost merely through disuse. Unless stopped up by due process of law, any rights previously dedicated will still exist, even if they are now neither used nor needed. This evidence must be looked at as a whole, it being unlikely that a single document or map will provide sufficient evidence to justify a change to the Definitive Map. The County Council is under a duty to record such rights as are found to exist, even if they are not claimed by the applicant.
- 7.6 The originals of many of the documents referred to in this report are only available in public record offices, but copies of most documents are available for inspection in the offices of the Countryside Access Team. Members are invited to inspect these, or the originals, when considering this report.

8 Documentary Evidence

Information on the background and evidential weight which should be attached to particular historical sources is included at Appendix 1, which should be read in conjunction with this section.

8.1 Early maps and plans

8.1.1 Isaac Taylor's Map of Hampshire – 1759 (1 inch to 1 mile)

Despite the poor quality of the draughtsmanship and the unequal topography on this map, the area known as 'Kents Oak' is annotated, making the identification of the claimed route possible. The route is shown shaded yellow, in the same way as other routes which are now public roads, and appears to be open at its junction with Lockerley Road.

8.1.2 Thomas Milne's Map of Hampshire – 1791 (1 inch to 1 mile)

The southern end of Saunders Lane is shown on Milne's Map by parallel pecked lines (which the legend describes as an 'open road') meeting Lockerley Road and continuing south along the road now recorded as Danes Road, which is shown situated directly opposite the claimed route (although on all subsequent mapping it is shown approximately one hundred metres further to the east). The Romsey to Lockerley Road was at the time a Turnpike Road, and a 'Bye Gate' is shown at the south-west side of the junction. The currently metalled section of Saunders Lane that runs adjacent to the claimed route is not evident, and the straight alignment of the route running north from Lockerley Road does suggest that it is the claimed route forming the junction with it.

8.1.3 Ordnance Survey Map – 1807 (2 inches to 1 mile)

For the first time, both the claimed route and the currently used 'alternative route' are shown, in a fashion that reflects current mapping. Danes Road is more accurately depicted running due south opposite the current junction with Saunders Lane, which is shown as being significantly wider than the claimed route. There are no lines across the claimed route's junction with Lockerley Road, apparently indicating that the route was unobstructed.

8.1.4 Ordnance Survey 'Old Series' Map – c1840s (1 inch to 1 mile)

The earliest 'Old Series' maps date from the 1810s, but the appearance of the railway line and Romsey Station on the sheet covering the area indicates that it was produced at some point after 1847 (when this particular station was opened). The map is based upon the earlier 1807 drawing but the detail is generalised to accommodate the map's reduced scale. The claimed route is shown as providing unobstructed access to Lockerley Road but again, the junction to the east provided by the route now recorded as Saunders Lane is shown as being much wider and directly opposite Danes Road. The improved definition on this map makes it clear that there is also now a route running west across Butlers Wood Common from Danes Road, just to the south of a building which is presumably the 'Bye Gate' shown on Milne's map. This route is now a private access road and also recorded as Awbridge Footpath 745.

8.1.5 Christopher Greenwood's Map of Hampshire – 1826 (1 inch to 1 mile)

In contrast to the OS plan, Greenwood's map shows the claimed route as having a similar width to the adjacent part of Saunders Lane. Footpath 745 is now shown as having a junction connecting directly to Lockerley Road, immediately opposite the claimed route. The letters 'TB' indicate the presence of a 'Toll Bar' at the junction.

8.1.6 Tithe Map and Award – 1841

The Tithe Map for the Parish of Michelmersh extends far enough to include Saunders Lane and the claimed route's junction with the Lockerley Road. On the map all land parcels are numbered, with the corresponding parcel described in the Award. The properties either side of the claimed route are numbered '749' and '750', and the Award lists these plots as 'Cottage and Garden' and 'Garden' respectively. Unusually, the roads on the map are not numbered, but many that are now recorded as public roads are shaded light brown, distinguishing them from other land parcels. The claimed route is shown in the same way as other roads on the map, its junction with the Lockerley Road apparently open. Footpath 745 is again shown directly opposite. The Toll House is shown a short way down Danes Road, indicated by the description 'Toll B'. The western continuation of Lockerley Road from this junction is not shown on the map, but the words 'From Lockerley' indicate its direction. At the other end of Saunders Lane, a road leading westward from the next junction is labelled 'From Mottisfont' – the claimed route appears to have been the most direct means of connecting these two junctions, and as such the Tithe Map appears to support the application.

8.2 Estate plans and related documents

8.2.1.1 Michelmersh Inclosure Award – 1797

In 1797, parts of Awbridge Common were enclosed as part of the Michelmersh Inclosure Award, pursuant to an Act of Parliament (36 Geo III, 1796). The map accompanying the award is entitled "Old Map of Timsbury and Michelmersh", and was produced by the surveyor John Randall in 1774 – the Inclosure Award was subsequently superimposed on this plan in red ink. Given that this map was not specifically produced as part of the inclosure process and is somewhat faded, and the fact that the claimed route appears on the very edge of the map, it has been difficult to interpret some of its detail. However, the plan, when viewed in tandem with the accompanying award, is sufficiently clear for the claimed route to be identified.

8.2.1.2 On the map, the entirety of Saunders Lane is shown running between Lockerley Road and the road now known as Dunbridge Lane. Whilst the eastern boundary in the southern half of the route is badly faded, it is possible to track the route's western boundary to the junction with Lockerley Road (which is annotated "Road to Lockerley"). The junction with Lockerley Road incorporates the claimed route – the curving alignment of Saunders Lane is not shown on the map and does not appear to be set out in the Award. A "Turnpike Gate" is annotated a little way to the east of the junction with Lockerley Road.

8.2.1.3 The Act itself was passed in 1797. As part of the process of detailing the lands to be inclosed, Commissioners were given powers to set out (or stop up unnecessary) public and private roads or ways. The relevant passage in the Award reads:

“And it was further enacted that the said Commissioners should in the first place set out and appoint such public and private roads and ways...in over through and upon the lands and grounds thereby directed to be divided and inclosed as they in their discretion should think requisite so as all such public roads for carriages should be and remain forty feet in breadth at the least between the fences...and all the public carriage roads should be well and sufficiently fenced out on both sides by such of the owners and proprietors of the said lands...”

In the section dealing with public ways to be set out, the Award first deals with Lockerley Road:

*“**Lockerley to Romsey** – One other public carriage road of the like breadth of forty feet from the south east end of an ancient lane in the parish of Lockerley following its usual course and direction over Awbridge Common to the west end of an ancient lane in the Tything or Hamlet of Awbridge aforesaid being part of a public carriage road from Lockerley to Romsey.”*

The next route to be set out is as follows:

*“**Michelmersh to Salisbury** – One other public carriage road of the like breadth of forty feet from a Gate at the north corner of Awbridge Common aforesaid thence running along the north-west side thereof to the beginning of the last described public road following for the space of one hundred and thirty-two yards the same road to the Turnpike Gate there, thence leading in a southward direction the course of an old road over the other part of the said common called Awbridge Common to its usual entrance on Dunwood Common being part of the public carriage road from Michelmersh to Salisbury.”*

It is considered that this description is a reference to Saunders Lane, and includes the claimed route. Perhaps the clearest indication that this is the case is the description of the distance between the above road and the Turnpike Gate being one hundred and thirty-two yards – the distance between the claimed route’s junction with Lockerley Road and the Turnpike Gate has been measured using the OS County Series First Edition (on which the Turnpike Gate was still shown) and the distance corresponds exactly.

- 8.2.1.4 This Inclosure Act, approved by Parliament and subject to public scrutiny and appeal, is one of the few historic sources that can prove the exact status and location of highways, and the identification of the claimed route in this particular Act offers strong support for the application.

NB – This evidence has been used to ascertain the dedicated width of the highway.

8.2.2 Survey of Copyholds in Michelmersh Manor – 1856

This record is contained in a notebook held in the County Record Office. Each area of land is documented by a written description on one page, with a colour tracing (which appears to be taken from the Tithe Map) of the land in question affixed to the opposite page. One entry describes two land parcels at ‘Kents Oak’ (shaded red and numbered 728 and 735), the southern-most of which lies adjacent to both Lockerley Road (annotated ‘From Lockerley’ and ‘To Awbridge’),

and Saunders Lane (*annotated 'From Mottisfont'*), both of which are shown shaded light brown. Both the claimed route and the 'alternative' alignment are shown in this way, indicating that they were both considered by the author to be part of the local highway network. The written description accompanying the tracing reads:

"One otherplot of land situate on Awbridge Common...728 and 735 on the Tithe Map bounded on part of the south-west by an allotment awarded as a public gravel pit, on the remaining part of the north-west by the public road from Michelmersh to Salisbury, and on the south-west by the public road from Lockerley to Romsey."

This description echoes that of Saunders Lane in the Inclosure Award nearly sixty years earlier, and the depiction of the claimed route in the same way as other public roads indicates that at this time the claimed route was considered to be part of the local highway network.

8.2.3 Conveyance of Land between Tankerville Chamberlain to John Neville Oldfield Thurston - 1894

The land parcels to be conveyed (shaded red) are those detailed at 8.2.2, Again, both Lockerley Road and Saunders Lane are shaded yellow (as is the top section of Danes Road, which is also shown). Saunders Lane is shown on its straighter alignment, thus including the claimed route - curiously the curving section now recorded as part of Saunders Lane is not shown, despite it appearing on earlier maps. Whatever the reason for this omission, the plan appears to show the claimed route as the primary means of accessing Lockerley Road from Saunders Lane.

8.2.4 Conveyance of Awbridge Farm – 1897

This conveyance covers a sizeable portion of the village of Awbridge. Land parcels, numbered in accordance with the numbering on the First Edition of the OS County Series, are shaded pink, and roads are shaded light brown. Both the claimed route and the curving section of Saunders Lane are shown as being of identical width and in identical fashion to the Lockerley Road, and appear to be unobstructed. A little way above the point where the two roads converge, the plan fades out, and the ongoing section of Saunders Lane heading northward is labelled *"To Dunbridge Station"*. This plan appears to indicate that both routes were in public use at the time, and as such this document supports the application.

8.3 Ordnance Survey large-scale maps

8.3.1 OS County Series 1st Edition & Book of Reference – c1870 (25 inches to 1 mile)

Saunders Lane is shown by a solid line on its eastern side (indicating a boundary feature) and a pecked line on its western side (indicating that the route was unenclosed). A parcel number '398' is written approximately halfway along the road, within its boundaries, which the accompanying Book of Reference describes as *'Road'*. The claimed route is shown as being part of this road, as indicated by an absence of any pecked lines separating it from the rest of the route. Properties line both sides of the claimed route (described in the accompanying Book of Reference as *"Houses and Gardens"*), and a pecked line across the junction with Lockerley Road denotes the extent of the parcel (there is no other annotation to indicate any obstruction at this point). The curved 'alternative' section now

recorded as being part of Saunders Lane that runs adjacent to the claimed route is at this time shown as being separate from the rest of the road, as indicated by a pecked line at the junction between the two. Additionally, this short section does not have its own parcel number and is shown to be part of the surrounding land by bracing symbols – the parcel number ('378') is described in the Book of Reference as 'Furze'. This map supports the proposition that at this time the claimed route, and not the curving alternative that is now recorded, was still considered to be part of Saunders Lane.

- 8.3.2 Ordnance Survey County Series 2nd edition – c1895 (25 inches to 1 mile)
This map shows Saunders Lane in identical fashion to the first edition - the 'alternative' route is still shown as being a separate entity to the straight road leading down to Lockerley Road, via the claimed route.
- 8.3.3 Ordnance Survey County Series 3rd edition – c1908 (25 inches to 1 mile)
There is no change in the depiction of the route when compared with the previous two versions.
- 8.3.4 Ordnance Survey National Grid Series Map – 1966 (1:2,500)
The claimed route still appears to be unobstructed, but significantly it is now shown as an enclosed 'Track' which, for the first time is shown, as being separated from the rest of Saunders Lane (as indicated by a pecked line at its northern end). The curving route is now annotated 'Saunders Lane', demonstrating its increased significance as part of the local highway network, and charting the claimed route's decline.
- 8.3.5 Summary of Ordnance Survey evidence
All three large scale County Series maps, and the Book of Reference accompanying the first edition, show or describe the claimed route in identical fashion to other routes in the locality that are now public roads. It is apparent that at some point during the 20th century the claimed route declined in significance, with the parallel route that met Lockerley Road opposite Danes Road clearly being favoured instead (as shown by the depiction of both routes on the National Grid map of 1966).

8.4 **Highway Board Minutes and other administrative records**

- 8.4.1 Romsey Rural District Council Highway Surveyor's Notebook – 1927-1928
This notebook covers only a brief several year period, but includes various references to Saunders Lane:

10th October 1927 – *"Saunders Lane – I have received a petition signed by 39 ladies and gentlemen asking your council to consider the question of widening the lower portion of this road."*

7th November 1927 – *"Saunders Lane – Your Roads Committee met on November 3rd to consider the above matter which was referred to at the last meeting and a report will be presented for your consideration."*

5th February 1928 – *"I have received letters from Mr L Withers and Mr W Collins complaining of the dangerous state of this road owing to its being too*

narrow. Accidents have recently occurred there and I should like your instructions on the matter.”

It is conceivable that these accounts refer to the section that included the claimed route, and perhaps offer some indication as to why the alternative route leading down to Lockerley Road was ultimately favoured as the primary means of linking the two roads.

8.4.2 Quarter Sessions

Officers have conducted a search of Quarter Session records, Roadway Proceedings and other relevant material and have found no evidence that public rights have ever been extinguished on the claimed route.

8.5 **County/District Highway and Planning records – 1929–1946**

8.5.1 Highways Handover Map (Romsey and Stockbridge Rural District Council) – 1929

This map was prepared by Romsey and Stockbridge Rural District Council to show those routes that it considered publicly maintainable highways (shaded blue) at the time responsibility was transferred to the County Council. Saunders Lane is shaded and reflects the alignment currently recorded on the List of Streets. However, it is clear that the claimed route was also shaded as faint traces of blue can still be seen within its boundaries, and the map in the immediate locality of the route is faded, suggesting that the route was originally shaded and then rubbed out. This suggests either confusion as to the claimed route’s status at the time the map was prepared, or that the Rural District Council originally considered to be a highway maintainable at public expense but subsequently changed their minds before submitting the map to the County Council (or that the County Council amended the map after receiving it). It could be inferred that, in light of the issues raised by the District Surveyor relating to the lower half of Saunders Lane (which it would appear included the claimed route), a decision was taken to adopt the alternative route, although this is merely speculative. What is clear from the map is that, ultimately, the route was not considered to be publicly maintainable.

8.5.2 Highways Maintenance Map (Romsey and Stockbridge Rural District Council) – 1946

This map was prepared by the County Highways Surveyor to show those routes that were considered to be publicly maintainable. The claimed route is excluded, indicating that that the County Surveyor did not consider it to be his responsibility. Again, this was an internally produced document that was not subject to public scrutiny, and it is not known what material was examined when decisions were made regarding maintenance liabilities.

8.5.3 Summary of local government records

There are several documents produced by local authorities in the period 1929-1946 which show the status of public ‘highways’ in the area. The 1929 Handover Map and the 1946 Maintenance Map do not record the claimed route as a publicly maintainable road or other highway. It is therefore necessary to consider how the documents were produced in order to determine what weight to give each piece of evidence.

8.5.4 The 1929 Handover Map was drawn up by the Rural District Council as a record of what they considered to be publicly maintainable highways and passed to the County Council on transfer of responsibility. There is no record of any public involvement or consultation as part of that process. The 1946 Maintenance Map was also an internal document, produced by the County Surveyor, as a record of those routes that were considered to be publicly maintainable. Again, there is no record of public involvement or consultation in the drawing up of these documents, and it is not clear whether historic documentary evidence (such as Inclosure Awards or Tithe Maps) was assessed. Essentially, the documents handed over by the Rural District Councils were taken on trust and no further work was carried out to establish what rights existed (or not as the case may have been).

8.6 **Correspondence Post-Definitive Map**

8.6.1 In 1981 a planning application was submitted to Test Valley Borough Council for the erection of two dwellings on the land containing the claimed route, which was subsequently refused. During subsequent correspondence, it emerged that representations had been made to the planning authority raising questions about the ownership of the land and alleging the existence of a right of way over it.

8.6.2 Letter from A H Hutchens, Clerk to Sherfield English Parish Council, to the County Secretary – 25th August 1982

In the wake of the above planning application, Mr Hutchens sought the County Council's comments on the status of the land and way, and put forward his own views on the subject:

“The trackway concerned was until fairly recently wide enough to take carts or motor vehicles but is now an overgrown footway. The trackway is also shown on the Tithe Map and on the First Edition 1” OS Map, circa 1810. Apart from wishing to maintain right of access this would be an area well suited to road alterations should the County Council consider this necessary in future...”

8.6.3 File Note by the County Surveyor – 21st September 1982

This note documents a call made to Mr Hutchens by the County Surveyor's Department in which it was acknowledged that *“from the evidence gathered from the maps highway rights do exist in the area. The map of 1870 indicates that the land in question is ‘highway land’....”* Presumably the ‘map of 1870’ referred to is the OS County Series First Edition, which showed the claimed route as ‘Road’.

8.6.4 Letter from A H Hutchens to the County Surveyor – 14th October 1982

In this letter Mr Hutchens set out the historical evidence which in his view supported the proposition of the claimed route being a public right of way. He cited the maps of Taylor, Milne, Greenwood and the OS ‘Old Series’, and the Michelmersh Tithe Map of 1841. He also put forward an account of his own use of the route:

“I (51 years of age) regularly cycled over the trackway as a boy and have been through it in motor vehicles. It has never been fenced...Although now barely a single lane footpath it was until fairly recently as mud trackway perfectly capable of accommodating an average sized lorry.”

No doubt I could supply names of other persons who are familiar with the area and who would support the contention that this is a public right of way.

My Council are most anxious that you will be able to substantiate your findings..."

8.6.5 Letter from the County Surveyor to Mr A H Hutchens – 21st October 1982

In response to the above letter, the County Surveyor acknowledged that the claimed route had:

"...consistently been shown on the Ordnance Sheets over a period well in excess of 100 years and it is quite probable that Public Rights over this track have been established.

It would be extremely difficult to raise an objection to development on the basis of the information presently available regarding this track. The only possible action...would be to register a claim in relation to the alleged Right of Way..."

There is no record of an application subsequently being submitted to the County Council (possibly for the reasons set out at 6.3). It is arguable that the County Council should have then acted upon the 'discovery of evidence' (see Section 2) without the necessity for an application to be made, but this clearly did not happen.

8.6.6 Memorandum from the County Secretary to the County Surveyor – 18th December 1984

This communication, apparently a reply to an earlier memorandum following communication from Awbridge Parish Council, states that:

"Prima Facie the track behind the Post Office is ancient highway and is therefore maintainable at the public expense to whatever is the appropriate standard. There does not seem to be any evidence to rebut this presumption and indeed the evidence referred to by Mr Hutchens would support the existence of highway rights.

Since the Parish Council are pressing us to give a view as to the status of the track, I propose to reply to them along the lines of the attached letter [see 8.6.7]. You will see that this commits us to regard the land as highway henceforth..."

8.6.7 Letter from the County Secretary to Mr T Greet, Clerk to Awbridge Parish Council – 7th January 1985

An extract from the above-mentioned letter reads:

"You are probably aware that this matter was first raised in 1982 by a Mr Hutchens on Sherfield English Parish Council and that he supplied a considerable amount of information concerning the land.

As far as the track is concerned, you may know that it is shown on a number of maps which pre-date 1835. This means that, prima facie, it is a highway maintainable at the public expense and I am not aware of any evidence to the contrary or that would suggest that public right of passage was confined merely to a right of way on foot. Although it appears to be maintainable by the County Council as Highway Authority, I should point out that this only imposes a duty to maintain the track to the standards suitable to the level of use which it receives. Having said that, the track is not at present shown on

the County Surveyor's records as a public highway. This is perhaps not surprising since it appears to have fallen into disuse to some extent; but, the fact that it has become overgrown does not affect its status since the rule is 'once a highway, always a highway'. I have asked the County Surveyor to note that in my view the track is a public highway and to amend his records accordingly."

8.6.8 Memorandum from the County Secretary to the County Recreation Officer – 16th April 1985

"There is no particular urgency to include this claim in your review as a matter of priority. The steps which I and the County Surveyor have already taken should mean that we are quickly alerted if any threat to this right of way materialises.

You may be right to suggest that this should be regarded as an un-metalled road rather than a byway although I should point out that the only County maintenance of which I am aware is that carried out recently at my request. Certainly in view of the past vehicular use, it would not seem appropriate to downgrade the track to any lesser status."

8.6.9 Correspondence between the County Council's Area Director (West) and Area Surveyor (West) – October 1986

Memorandum from Area Surveyor - 21st October 1986

"Awbridge Parish Council has raised the question of surfacing the track [the claimed route is described]. The Area Highways Superintendent reports that the matter has been discussed before but there appears to be no evidence on available plans that the track has highway status.

I would be grateful if a check could be made as to the status of the track."

Memorandum from Area Director – 27th October 1986

"With reference to you memorandum of 21st October 1986, I attach copy correspondence between the County Secretary and Awbridge Parish Council [the letter at 8.6.7 is cited]. This correspondence was copied to the Divisional Surveyor at the time – there was talk of a junction improvement when the matter was raised.

You will note the status of this track as un-metalled unclassified highway..."

8.6.10 Summary of Correspondence Post-Definitive Map

This correspondence supports findings of officers during this investigation, and clearly demonstrates that during the 1980s the County Council was of the view that the claimed route was an 'ancient highway', and that full highway rights still subsisted on the route at that time. It is also apparent that after the status of the route was queried by Awbridge and Sherfield English Parish Councils, the County Council undertook some maintenance of the route.

9 User Evidence

9.1 Sixteen user evidence forms have been submitted in support of this application, ten in 1983 when the status of the claimed route first came under scrutiny, and

another six which accompanied Awbridge Parish Council's application of 2006. Although some of the forms are light on detail (particularly the earlier forms, which asked for only basic information) and not all of the evidence of use would support the acquisition of byway rights (some use was only on foot or on a bicycle), this evidence adds weight and credibility to the historic evidence which suggests that the lane was part of the public highway network, and also provides a picture of how the lane has been used and managed during the 20th century. Officers have not sought additional user evidence because the documentary evidence in support of this claim is particularly strong. It is therefore possible that more evidence of use of this lane could be found. The evidence received is summarised below.

- 9.2 The user evidence provided covers the period from the early part of the 20th century up to the submission of the claim in 2006, with the earliest use dating from the 1920s. Several people put forward use of over fifty years. None of the witnesses stated that their use was challenged or prevented in any way, and no-one reported the existence of any gates or other obstructions at either end of the route.
- 9.3 Eight people gave evidence of use with a vehicle. In particular, **Mr F Head** and **Mr W Cooper** used the route as a short cut during the 1920s and 1930s in commercial vehicles, and **Mr G Henwood** used it in horse-drawn and farm vehicles during the same period. **Mrs K Hillier** used the claimed route daily to deliver milk in a horse and cart during the war years. Other people, including **Mr P Roles** and **Mr A Young** appear to have used the route in vehicles as a short cut between Saunders Lane and Lockerley Road – Mr Young also recalled the route being used as a layby by motor coaches from Southampton during the Blitz in the Second World War.
- 9.4 More recent user evidence submitted in 2006 indicates that public use of the route had by this time decreased, with predominant use at the time appearing to be on foot – **Mrs J Clark** began walking the route in 1990, but stated that her use ceased in 2004 due to it being "*overgrown with brambles*". **Mrs S Wheeler** also described the route as overgrown – her use also ceased in 2004.
- 9.5 Summary of User Evidence
 From the user evidence it is apparent that there has been unchallenged and uninterrupted use of the claimed route by the public on foot, bicycle, horse-back and in horse-drawn and motorised vehicles within living memory. This evidence reinforces the earlier documentary evidence which portrays the claimed route as part of the local highway network. The evidence also charts the decline of the route – in the early part of the 20th century it appears to have been regularly used by both motorised and non-motorised vehicles as part of a commuter route, but in more recent years vehicular use has been sparse, and reported use of the route has been more as an occasional short cut or recreational route, more often by people on foot, eventually resulting in the route becoming overgrown and therefore impassable, contributing further to its decline.

10 Consultations

- 10.1 The following people and organisations have been consulted on this application:

The Ramblers, Auto Cycle Union, British Driving Society, British Horse Society, Byways and Bridleways Trust, Cyclists' Touring Club, Open Spaces Society, Awbridge Parish Council, Test Valley Borough Council, County Councillor Roy Perry, Hampshire County Council (Hampshire Highways and the Area Countryside Access Manager).

10.2 The Ramblers

"In all probability this was an ancient track. It is directly opposite FP 745 which leads into Newtown.

Ideally as a walking group we would support a footpath or bridleway. We do not think it would be sensible or desirable to allow vehicular rights over such a short distance when there are public roads very close and convenient to use. Our group have walked the route and only this year cleared the route of fallen trees and vegetation. It would provide a safe route from FP 1 to Saunders Lane. The alternative is to use Lockerley Road which does not have any footways or verges."

10.3 Cyclists' Touring Club

"[The route] is almost invisible from Lockerley Road but is clearly a continuation of the footpath from Kent's Oak. The proposed byway is covered in leaf litter and is very muddy - it could be used by a cyclist with a mountain bike but I would hesitate to use it with a road bike as it is. The route is not overgrown by brambles which may indicate there is a solid subsurface. It is clearly well used by horse riders and presumably by walkers though there were no footprints visible. I could not see any signs of current use by cyclists - but it could be that it is used in the summer months. Local cars park where the proposed byway meets Saunders Lane. From my visit today I saw clear evidence of public use of the route. Given the current users it would be preferable if the route could be designated for non-motorised users only."

10.4 The British Horse Society and British Driving Society

"BHS and the BDS we would be happy for this to become a restricted byway providing appropriate 'furniture' (i.e. lockable bollards with a gap of 1.6m) is put in place to restrict its use by motorised vehicles, but does not prohibit the use by horse riders and carriage drivers."

10.5 County Councillor Roy Perry

Councillor Perry is aware of the application

No other comments have been received.

11 Conclusions to be reached from the evidence

11.1 The claimed route appears to have formed part of the public highway network since at least the 18th century. It was set out as part of the road from Michelmersh to Salisbury in the Michelmersh Inclosure Award, and was also shown on commercial maps dating from that period. It is also shown on Ordnance Survey maps dating from the early 19th century, on which it is depicted in a way that makes it indistinguishable from other routes which are now public roads. Similarly, on sale documents of the late 19th century, the claimed route is shown as falling

outside the ownership of the property for sale, indicating its status as part of the highway network – it is likely at this time that the route was in the hands of surveyors of the highways subsequent to it being set out at Inclosure.

- 11.2 The Michelmersh Inclosure Award of 1797 followed an open and transparent process authorised by an Act of Parliament, and as such, any public road or way set out in this document is legally conclusive evidence of highway status. The Commissioners were given powers to set out private and public roads, and the detailed description of the road from Michelmersh to Salisbury in the Award makes it clear that the claimed route is included as part of its length. This evidence offers strong support for the application.
- 11.3 The evidence viewed suggests that by the early 20th century, the claimed route's significance as part of the local highway network had diminished. However, the amendment that appears to have been made to the County Council's 1929 Handover Map suggests that even up to that point it was still considered to be a public road (albeit that it was ultimately determined by the County Council not to be a road which they considered to be publicly maintainable at that time). This period appears to mark the point when the alternative route which is now adopted and forms part of Saunders Lane was favoured over the claimed route as a means of accessing Lockerley Road. Any rights which existed on the claimed route prior to this time would not have been lost merely through disuse, and officers have no evidence in Quarter Session records to indicate that public rights over it have ever been extinguished.
- 11.4 The user evidence supports the documentary evidence in depicting the claimed route as part of the local highway network. There is evidence of use by members of the public on foot, horseback, bicycle and in vehicles without interruption or challenge since the early part of the 20th century, which appears to have diminished to the extent that only occasional use was made of the route by the start of the 21st century, predominantly by pedestrians. The volume of vehicular use (which would give rise to the acquisition of byway rights) documented is relatively low, but the strength of the historic documentary evidence outweighs any shortfall in this evidence.

12 Natural Environment and Rural Communities Act 2006

- 12.1 There remains to be considered whether motorised vehicular rights have been extinguished by the NERC Act 2006. They will have been unless one of eight exceptions contained within Sections 67(2) and 67(3) of the Act applies. These exceptions are set out in Section 2 and are examined in turn below. In the event that none of the exemptions can be shown to apply to this route, the highest status at which the route can be recorded is restricted byway.
- 12.2 Section 67(2) – rights for mechanically-propelled vehicles will not have been extinguished on an existing public right of way if:
- (a) ***it is over a way whose main lawful use by the public during the period of 5 years ending with commencement was use for mechanically propelled vehicles.***

There is little evidence of use of the route by the public in motor vehicles during this period, with most use during the five years before commencement apparently being by non-motorised users (particularly pedestrians).

- (b) ***immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c.66) (list of highways maintainable at public expense).***

The route was not recorded on the Definitive Map on 2nd May 2006, nor was it recorded on the List of Streets on this date.

- (c) ***it was created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for mechanically propelled vehicles.***

No evidence was discovered during officers' investigations that the claimed route came into being as a result of an express dedication or by statute.

- (d) ***it was created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.***

The route was not constructed as a road specifically for motorised vehicles. There is clear evidence that the route was in use as a public carriageway prior to the advent of motorised vehicles.

- (e) ***it was created by virtue of use by such vehicles during a period ending before 1st December 1930.***

There is evidence that the route existed as a public highway before mechanically-propelled vehicles became commonplace, so it cannot be said that public vehicular rights were *created* as a result of use by such vehicles. They are more likely to have been created as a result of use by horse-drawn vehicles.

- 12.3 The exceptions in Section 67(3), which require that the application to record the route as public be made to the County Council prior to 20th January 2005, do not apply in this case.

13 Comments by the Landowner

- 13.1 Mrs Cooper has reviewed the report, and has given the following response:

"If this track is to be reopened I feel the sensible action would be to make it a restricted byway. To allow motorised vehicles out of this track on to the Lockerley Road in the 21st century would be very dangerous."

14 Conclusions

- 14.1 There is evidence that the claimed route has existed as an unobstructed physical feature in the landscape since at least the end of the 18th century.

- 14.2 There are numerous documents which, when taken as a whole, indicate that the route formed part of the local public highway network since at least the latter part

of the 18th century. Further, the Inclosure Award of 1797 actually sets the route out as a public carriage road, with a width of forty feet (approximately 12 metres).

- 14.3 It is apparent that the route's significance as part of the local highway network had diminished by the early 20th century, but also that the lane has been used by members of the public on foot, horseback, bicycle and in motorised and non-motorised vehicles within living memory.
- 14.4 The documentary evidence and, to a lesser degree, the user evidence, demonstrates that, on the balance of probabilities, the claimed route was once a vehicular highway. The provisions of the NERC Act 2006 have extinguished rights for mechanically propelled vehicles, and none of the exemptions within the Act can be applied, so the route cannot be recorded as a BOAT. There is no evidence to suggest that public rights on the route were extinguished prior to the enactment of the NERC Act 2006.

15 Recommendation

- 15.1 That authority is given for the making of a Definitive Map Modification Order to record a restricted byway with a width of forty feet [twelve metres], on the route shown between A – B on the Committee Plan, based on historic documentary evidence.

CORPORATE OR LEGAL INFORMATION:**Links to the Corporate Strategy**

Hampshire safer and more secure for all:	yes/no
Corporate Improvement plan link number (if appropriate):	
Maximising well-being:	yes/no
Corporate Improvement plan link number (if appropriate):	
Enhancing our quality of place:	yes/no
Corporate Improvement plan link number (if appropriate):	
OR	
This proposal does not link to the Corporate Strategy but, nevertheless, requires a decision because: the County Council, in its capacity as ‘surveying authority’, has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Claim Reference: CR/970

Location

Countryside Access Team
 Castle Avenue
 Winchester
 SO23 8UL

IMPACT ASSESSMENTS:

- 1 Equalities Impact Assessment: N/A**

- 2 Impact on Crime and Disorder: N/A**

- 3 Climate Change:**

This report does not require impact assessment but, nevertheless, requires a decision because the County Council, in its capacity as the 'surveying authority', has a legal duty to determine applications for Definitive Map Modification Orders made under s.53 Wildlife and Countryside Act 1981.